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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

SERGE RUBINSTEIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion in the Court of Appeals (R. 17-27) is reported at 206 F. 2d 449. A prior order and opinion of that court in the case appears at pp. 13-15 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1953 (R. 27-28). The petition for a writ of certiorari was filed on August 28, 1953, and granted on November 9, 1953 (R. 31). The

jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Immigration and Nationality Act of 1952, deportation orders may be challenged in the courts otherwise than in habeas corpus proceedings.

2. If the answer to question (1) is in the affirmative, whether, after an alien commences an action in a District Court challenging the validity of an order for his deportation, a preliminary injunction may be issued to restrain the Attorney General from taking the alien into custody.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 55-63.

STATEMENT

On December 29, 1952, an order of deportation was issued against respondent under Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, on the ground that he had been convicted of a crime involving moral turpitude committed within five years after entry into the United States. Respondent, who was allegedly admitted to the United States for permanent residence in 1938 and who had last entered this country in 1939 (R. 1) had been convicted in 1947 on a charge of filing, and conspiracy to file, false affidavits in 1943 in order to evade military service under the Selective Training and Service Act of 1940. *United States* v. *Rubinstein*, 166 F. 2d 249 (C. A. 2), certiorari de-

nied, 333 U. S. 868. During the administrative deportation proceedings, respondent was released from custody under bond of $1,000.

The day after the order of deportation was issued, respondent filed a complaint in the United States District Court for the District of Columbia, under the Declaratory Judgment Act (28 U. S. C. 2201) and the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*), against the then Attorney General, praying for a judgment declaring the deportation order invalid and enjoining the Attorney General from taking respondent into custody (R. 1-5). The complaint alleged, *inter alia,* that the crime of which respondent had been convicted did not involve moral turpitude and that he had been denied due process in the administrative proceedings (R. 2-3). Respondent accompanied his complaint with a motion for a preliminary injunction to restrain the Attorney General from taking respondent into custody pending determination of the suit (R. 4). The complaint alleged that "defendant is threatening to take plaintiff into custody for the purpose of deporting him" (R. 3), while an affidavit of counsel filed in support of the application for a preliminary injunction asserted that the detention of the plaintiff rather than a continuation of his release on bond would constitute an abuse of discretion (R. 5). Judge Pine denied the motion (R. 6) and respondent appealed to the Court of Appeals. On January 5, 1953, the Court of Appeals, ruling that a declaratory judgment action lies to test the validity of a deportation order, remanded the motion

to the District Court "for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings" (R. 7).

After the remand, on January 23, 1953, Judge Letts denied the motion, stating that it is well settled law that a court will not issue a preliminary injunction unless the movant establishes with reasonable certainty that he will succeed in the ultimate action; that the only ground for respondent's action which might possibly be considered substantial was his contention that his crimes did not involve moral turpitude; and that this contention was without merit (R. 7-11).

On January 24, 1953, respondent again filed a notice of appeal, and moved for an order restraining petitioner from apprehending and detaining respondent pending determination of the appeal (R. 11, 12). The court below granted the motion on January 26, 1953, with Judge Fahy dissenting on the ground that, as he read Section 242(c) of the new Immigration and Nationality Act, *infra*, pp. 58-60, the Attorney General was authorized to arrest respondent after the entry of the order of deportation and decide whether to detain him during the period of litigation. Judge Fahy pointed out that respondent's proper remedy was in habeas corpus if he was administratively detained (R. 13-15).

In an opinion dated June 11, 1953 (R. 17-25), Judge Proctor dissenting (R. 25-27), the Court of Appeals remanded the case to the District Court with directions to issue a preliminary injunction

restraining petitioner from revoking respondent's bail and from taking him into custody under a warrant of deportation pending final determination of his action, unless petitioner shows "that there are adequate reasons for making the arrest." In this connection the court held that *Heikkila* v. *Barber*, 345 U. S. 229, sustaining the Government's contention that the finality clause of Section 19(a) of the Immigration Act of 1917, 39 Stat. 890, as amended, precluded judicial review of deportation orders otherwise than in habeas corpus proceedings, was not controlling, since the language and legislative history of Section 242 of the new Act, *infra*, pp. 55-60, reflected a purpose of Congress to make other avenues of review available (R. 18-24). The court held that Section 242(c) of the new law did not authorize the detention of respondent, for the reason that the six-month period during which the statute gives the Attorney General discretion to detain an alien who has been ordered deported begins to run "if judicial review is had, * * * from the date of the final order of the court" and no final order had yet been entered. The purpose of such detention, it said, was "to effect the alien's departure from the United States" and departure cannot be effected while a deportation order is under judicial review. However, since the court thought that it was hardly reasonable that Congress intended completely to preclude the Attorney General from arresting an alien during the period of court litigation regarding the validity of a deportation order, it interpreted Section 242(a) of the new law, *infra*,

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p. 55, to authorize detention during such period even though that subsection literally applies only to the detention and release of aliens during the period while their deportability is being administratively determined. The majority concluded that under *Carlson* v. *Landon*, 342 U. S. 524, respondent's detention could not be justified unless it was shown that he is likely to abscond or that he is a security risk (which he alleged was not the case). Judge Proctor dissented (R. 25-27), for substantially the reasons advanced by Judge Fahy and Judge Letts, (*supra*, p .4).

SUMMARY OF ARGUMENT

Under the Immigration and Nationality Act of 1952, deportation orders may be challenged in the courts only in habeas corpus proceedings. Therefore, the District Court lacks jurisdiction to review the order for respondent's deportation in this action under the Declaratory Judgment and Administrative Procedure Acts, and the court below erred in directing the issuance of a preliminary injunction restraining the Attorney General from taking respondent into custody pursuant to the deportation order. However, even if the deportation order is subject to judicial review in such an action, the issuance of such a preliminary injunction was precluded by Section 242 of the Immigration and Nationality Act under which the Attorney General's determination with respect to the detention or release of an alien may be revised by the courts only in habeas corpus proceedings.

I

Congress has provided in Section 242(b) of the Immigration and Nationality Act of 1952 that in deportation cases "the decision of the Attorney General shall be final." In *Heikkila* v. *Barber*, 345 U. S. 229, this Court held that identical language in the Immigration Act of 1917 precluded challenge of deportation orders in the courts except in habeas corpus proceedings, and made inapplicable the judicial review provisions of Section 10 of the Administrative Procedure Act which by their terms govern "Except so far as * * * statutes preclude judicial review."

In the *Heikkila* decision, it was pointed out that the term "final", as used in immigration legislation, has had a long history, "both in the statutes and in the decisions of this Court", precluding court intervention except only in habeas corpus proceedings. The reenactment of this finality provision in the 1952 Act alone compels the conclusion that deportation orders continue to be reviewable by the courts only in habeas corpus proceedings.

Only the most conclusive evidence of a contrary Congressional purpose would warrant disregard of the express statutory language and its accepted meaning and consequences. While the court below found such evidence in the legislative history of the 1952 Act, we submit that that history shows that Congress understood that deportation orders could be challenged only in habeas corpus proceedings and that it rejected amendments which would have

made deportation orders reviewable in an action such as respondent commenced in this case.

In the comprehensive 1950 report of the Senate Committee on the Judiciary (S. Rep. 1515, 81st Cong., 2d Sess.) entitled *The Immigration and Naturalization Systems of the United States,* and which embodies the Congressional understanding of existing law upon which the 1952 Act was predicated, it was stated that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." It is significant that this statement was made after the Courts of Appeals for the Third and District of Columbia Circuits had held, in *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457, and in *Kristensen* v. *McGrath,* 179 F. 2d 796, that Section 10 of the Administrative Procedure Act had made deportation orders reviewable by the courts in proceedings other than habeas corpus. Thus, there is no basis for the conclusion of the court below that when the 1952 report of the court below (R. 22) that when the 1952 report of the Senate Committee (S. Rep. 1137, 82nd Cong., 2d Sess.) on S. 2550 stated that the deletion of a provision which would have restricted review of deportation orders to questions of law "is not intended * * * to expand judicial review in immigration cases beyond that under existing law," the reference to "existing law" meant the Administrative Procedure Act as then interpreted by the Courts of Appeals. Rather, the two Senate committee reports read together, reflect a clear understanding that prior to the 1952 Act deportation orders could

be challenged only in habeas corpus proceedings and a purpose to continue that principle.

During the House debate, Representative Meader introduced an unsuccessful amendment which would have deleted the provision in Section 242(b) that the Attorney General's decision shall be "final" and would have provided that "the order of deportation shall be subject to review by any court of competent jurisdiction." In opposing the Meader amendment, Representative Walter stated that Section 10 of the Administrative Procedure Act was already applicable. However, Representative Walter explained that his conclusion was based upon Section 403(a)(47) of the Act which repeals the paragraph of the Supplemental Appropriation Act, 1951, which, following this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, provided that deportation and exclusion proceedings should be conducted "without regard to the provisions of sections 5, 7 and 8 of the Administrative Procedure Act." Since neither this provision nor its repeal by the 1952 Act has anything to do with the application of the judicial review provisions of Section 10 of the Administrative Procedure Act, it is clear that Representative Walter's statement was based upon a misunderstanding. Obviously, his statement cannot be relied upon in interpreting provisions of the statute upon which he did not rely for his conclusion.

During the Senate debates, Senators Lehman, Moo ly and Morse offered amendments which would have accomplished the result reached by the court

below. Each of these amendments was rejected. While the debate on these amendments tended to be confusing because some of them dealt with matters in addition to judicial review, it made clear that the Senate was unwilling to make changes in the review of deportation orders without further study and, in particular, that the Senate was unwilling to make exclusion orders reviewable otherwise than in habeas corpus proceedings, as contemplated by the Morse amendment.

While the court below found support for its conclusion in the incidental references to "judicial review" in Section 242(c) and (e) as indicating that Congress was drawing the precise distinction between "judicial review" and habeas corpus which this Court made in *Heikkila* v. *Barber, supra,* it is clear that Congress was simply recognizing that the actual deportation of an alien is deferred during judicial examination of the deportation order in habeas corpus proceedings. The court below also thought that Section 360(c) of the Act expressly limited review of exclusion orders to habeas corpus, from which it concluded that Congress did not intend to so limit the review of deportation orders. This deduction is erroneous in that Section 360(c) does not deal with exclusion cases generally, but provides a new and restrictive method by which persons without the United States can assert claims of American citizenship. Exclusion orders generally are governed by Section 236(c) which, like the exclusion provision of the 1917 Act which was before this Court in *Tom We*

Shung v. *Brownell,* decided December 7, 1953, provides that the administrative decision in exclusion cases shall be "final".

If the decision below stands, in the face of the command of Section 242(b) that the Attorney General's decision shall be "final", it will be arguable that exclusion orders also will be reviewable in proceedings other than habeas corpus. Since the legislative debates on the 1952 Act indicate that Congress was particularly unwilling to provide review otherwise than in habeas corpus for exclusion orders, this circumstance is a compelling practical reason for leaving the review of both deportation and exclusion orders to habeas corpus until Congress chooses to deal with the subject.

II

Even if the order for respondent's deportation may be reviewed by the courts in proceedings other than habeas corpus, Section 242 of the Immigration and Nationality Act precludes any judicial revision of the Attorney General's determination to detain or release on bond or other conditions an alien under order of deportation except in habeas corpus proceedings. It is immaterial whether the detention or release of an alien during the period in which he is challenging in the courts the order for his deportation is governed by Section 242(a) or (c), since both subsections contain substantially identical detention provisions.

Thus, the provision of Section 242(c) that any court shall have authority "to review or revise any

determination of the Attorney General concerning detention, release on bond, or other release during such six-month period *upon a conclusive showing in habeas corpus proceedings"* that the Attorney General is not proceeding with reasonable dispatch to effect the alien's deportation, indicates on its face the purpose of Congress that habeas corpus proceedings should constitute the exclusive method for challenging such determinations. It follows that Congress intended that the Attorney General's determination as to detention or release should be reviewed only after he has taken an alien into custody, rather than before by restraining him from taking the alien into custody at all. The exclusiveness of the habeas corpus remedy is emphasized by the fact that even in such proceedings Congress has limited judicial review of the Attorney General's detention decision to cases in which it is conclusively shown that he is not proceeding with reasonable dispatch. Regardless of the scope of review, however, it is entirely clear that Congress did not contemplate that the Attorney General could be compelled by preliminary injunction to justify in advance his prospective exercise of the discretionary power vested in him to determine whether aliens who have been ordered deported should be detained during the period authorized by Section 242.

The changes which Congress made in the detention provisions of Section 242, as compared with the antecedent provisions in Section 23 of the Internal Security Act of 1950 which were before this Court in *Carlson* v. *Landon,* 342 U. S. 524, clearly

indicate that Congress intended the Attorney General's determination with respect to detention or release to be unreviewable by the courts except upon a conclusive showing that the Attorney General was not proceeding with reasonable dispatch. Assuming, arguendo, that is consistent with the Congressional purpose to apply some other standard in reviewing such determinations as to detention during the period in which the deportation order is being reviewed by the courts, we suggest that the proper standard is that applied by the District Judge and by the dissenting judge below. That test is whether the underlying action challenging the deportation order presents a substantial question which creates a "reasonable belief that the plaintiff will prevail upon a final hearing." Applying that test to respondent's principal challenge to the order for his deportation, i.e., that his conviction for violation of the Selective Training and Service Act of 1940 did not relate to a crime involving moral turpitude, it is clear that there was no basis for restraining the Attorney General from taking respondent into custody pursuant to Section 242 of the Act.

ARGUMENT

I

Since the District Court Lacked Jurisdiction to Review the Order for Respondent's Deportation, the Court of Appeals Lacked Power to Direct the Issuance of a Preliminary Injunction Restraining the Attorney General from Taking Respondent into Custody.

This case arises out of an action instituted by respondent in the United States District Court for

the District of Columbia "for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001, et seq.)" challenging the validity of an order directing the deportation of respondent (R. 1-3). The action of the court below, in directing the District Court to issue a preliminary injunction restraining the Attorney General "from revoking [respondent's] bail and from taking him into custody on a warrant of arrest for deportation, pending final determination of this suit" (R. 28), necessarily presupposes that the District Court has jurisdiction to review the order for respondent's deportation in an action for a declaratory judgment and for review under Section 10 of the Administrative Procedure Act. However, neither that court nor the Court of Appeals was empowered to issue or to direct the issuance of such a preliminary injunction because "there was an insuperable objection to the maintenance of the suit in point of jurisdiction." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52. The "insuperable obstacle" here is that the validity of the order for respondent's deportation may be challenged only in habeas corpus proceedings, with the result that the District Court was without jurisdiction to determine respondent's action under the Declaratory Judgment and Administrative Procedure Acts.

A. *Under Heikkila v. Barber, 345 U. S. 229, the provision of Section 242(b) of the Immigration and Nationality Act that in deportation cases the decision of the Attorney General shall be "final", deprived the District Court of jurisdiction to review the order for respondent's deportation in an action under the Declaratory Judgment and Administrative Procedure Acts.*

On December 29, 1952, following administrative proceedings, the Attorney General ordered that respondent be deported. The Immigration and Nationality Act of 1952 had become effective on December 24, 1952. Section 242(b) of the 1952 Act provides that, "In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final." We contend that under the rationale of this Court's recent decision in *Heikkila* v. *Barber,* 345 U.S. 229, the command of the 1952 Act that in deportation cases the Attorney General's decision shall be "final" means that deportation orders may be challenged in the courts only in habeas corpus proceedings.

In *Heikkila* v. *Barber, supra,* an alien who had been ordered deported under the Immigration Act of 1917 sought judicial review of the deportation order in an action for a declaratory judgment and for review under Section 10 of the Administrative Procedure Act. Looking to the provision of Section 19(a) of the 1917 Act that "In every case

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where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final," this Court concluded that Congress had cut off judicial intervention in deportation cases except in the habeas corpus proceedings made available by the Constitution. Accordingly, it was held that deportation orders fell within the introductory exception of Section 10 of the Administrative Procedure Act, i.e., "Except so far as (1) statutes preclude judicial review," with the result that such orders continued to be challengeable in the courts only in habeas corpus proceedings, notwithstanding the Declaratory Judgment and Administrative Procedure Acts.

Reviewing the history of the statutory provision that in deportation cases the decision of the Attorney General shall be "final", this Court noted (345 U.S. at 233-235):

> That the Attorney General's decisions are "final" does not settle the question. The appellant properly emphasizes the ambiguity in that term. Read alone, it might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked. But "final," as used in immigration legislation, has a history, both in the statutes and in the decisions of this Court. It begins with § 8 of the Immigration Act of 1891, 26 Stat. 1085, which provided in part that "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be

final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." * * * With changes unimportant here, this finality provision was carried forward in later immigration legislation. See, *e.g.*, § 25 of the 1903 Act, 32 Stat. 1220, and § 25 of the 1907 Act, 34 Stat. 906. During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution. * * *

Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 889, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. And the decisions have continued to regard this point as settled. *Kessler* v. *Strecker,* 307 U. S. 22, 34 (1939); *Bridges* v. *Wixon,* 326 U. S. 135, 149, 166, 167 (1945); *Estep* v. *United States,* 327 U. S. 114, 122, 123, n. 14 (1946); *Sunal* v. *Large,* 332 U. S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. * * *

The reenactment, practically verbatim, in Section 242(b) of the 1952 Act of the "final" clause of the 1917 Act which was before this Court in *Heikkila* compels the conclusion that under the new Act deportation orders continue to be challengeable in the courts only in habeas corpus, and may not be

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reviewed in actions under the Declaratory Judgment and Administrative Procedure Act.[1] This conclusion does not rest solely upon the reenactment of the finality clause. In modern times, Congress ordinarily makes detailed arrangements (in such respects as timing and venue) for direct judicial review where such is contemplated. See Davis, *Administrative Law* (1951), pp. 724-729. The failure of Congress to make such provision in the comprehensive revision of the immigration laws in 1952 is strong confirmation that it did not contemplate judicial intervention in deportation cases except in habeas corpus proceedings in accordance with well-established rules.

B. *The legislative history of the 1952 Act confirms that Congress was unwilling to make deportation orders reviewable by the courts in proceedings other than habeas corpus.*

Despite the reenactment in the 1952 Act of the finality clause of the 1917 Act which was decisive in *Heikkila* v. *Barber, supra,* the court below concluded from the legislative history of the 1952 Act that Congress intended to subject deportation orders to direct judicial review, as, in this case and in *Heikkila,* in an action under the Declaratory Judgment and Administrative Procedure Acts. We

---

[1] The district courts generally have considered the rationale of *Heikkila* v. *Barber, supra,* applicable under the 1952 Act. *Mirabel* v. *Glover* (D.C. P.R., Civ. No. 8445), June 18, 1953; *Ng Wong Dung* v. *Brownell* (S.D. N.Y., Civ. No. 84-356), June 10, 1953; *Sursos* v. *Zimmerman* (E.D. Pa., Civ. No. 14913), March 31, 1953; *Hyun* v. *London* (S.D. Cal., No. 15693-T), July 17, 1953.

submit, to the contrary, that this history shows that Congress was unwilling to make such a change in the existing law, as evidenced particularly by its rejection of amendments which would have accomplished the result of the decision below.

The heavy reliance of the court below upon statements made on the floor of the Senate and the House in the course of a long and bitter debate upon a comprehensive revision of the immigration and naturalization laws, requires careful examination of the context in which they were made, together with appropriate emphasis upon what Congress *did* in contrast to what was said.

The Senate Reports. The Immigration and Nationality Act of 1952 was preceded by extensive Congressional studies of the pre-existing laws and their operation. The results of these studies are contained in S. Rep. 1515, 81st Cong., 2d Sess., dated April 20, 1950, a report of the Senate Committee on the Judiciary entitled *The Immigration and Naturalization Systems of the United States.* This report appears to constitute the Congressional understanding of the prior law upon which the 1952 Act was predicated. The report contains the following statement (p. 629):

> *Judicial review*
>
> Once the order and warrant of deportation are issued, the administrative process is complete. Under the fifth amendment to the Constitution, the "due process" provision, the alien may, however, petition for a writ of habeas corpus. In a habeas corpus proceeding,

> based on a deportation case, the court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. *Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.* The dismissal of an application for a writ of habeas corpus is not a bar to the filing of another application before another judge. [Emphasis supplied.]

It is significant that the quoted statement, made in 1950, anticipates this Court's decision in *Heikkila* v. *Barber, supra,* and ignores the prior decisions of the Courts of Appeals for the Third and District of Columbia Circuits, rendered in 1948 and 1949 respectively, holding that Section 10 of the Administrative Procedure Act had made deportation orders reviewable in proceedings other than habeas corpus. *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457 (C.A. 3); *Kristensen* v. *McGrath,* 179 F. 2d 796 (C.A. D.C.).

On the same day that S. Rep. 1515 was issued, Senator McCarran introduced S. 3455 (81st Cong., 2d Sess.), the precursor of the 1952 Act. Section 106 of S. 3455 provided that determinations of fact and exercises of discretion by administrative officers "shall not be subject to review by any court," and that determinations of law by administrative officers "shall not be subject to review by any court

except through the writ of habeas corpus." This Section 106 also appeared in the successor bills, S. 716 and H.R. 2379, which were introduced in the First Session of the 82d Congress. These provisions would have restricted drastically the area of judicial intervention in deportation cases. Cf. *Bridges* v. *Wixon*, 326 U.S. 135, and *Carlson* v. *Landon*, 342 U. S. 524.

During the Joint Hearings before the Subcommittees of the Senate and House Committees on the Judiciary on S. 716 and H. R. 2379, in March and April 1951, this novel and restrictive effect of Section 106 was called to the attention of the subcommittees, particularly by Mr. Ennis representing the American Civil Liberties Union and by Mr. Wasserman representing the American Bar Association, who pointed out that it would cut off the review of findings of fact which otherwise would be available in habeas corpus for both exclusion and deportation cases. Hearings, pp. 136-138, 526-530.

Apparently as a result of such objections, when the successor bills, S. 2550 and H.R. 5678, were introduced in the Second Session of the 82d Congress, Section 106 was omitted. The only explanation of the omission is contained in the report of the Senate Committee on the Judiciary (S. Rep. 1137, 82d Cong., 2d Sess.) accompanying S. 2550 which states (p. 28) that:

> In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the exercise of administrative discretion should not be subject

> to judicial review and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. *The omission of the language is not intended* to grant any review of determinations made by consular officers, nor *to expand judicial review in immigration cases beyond that under existing law.* [Emphasis supplied.]

The quoted language, read in the light of the objections raised at the hearings, makes it clear that the deletion of Section 106 represented abandonment of the idea of *greatly restricting* the area of review which had theretofore prevailed in habeas corpus proceedings in deportation cases, and to leave the review of deportation cases to that which prevailed *"under existing law."*

The court below, however, assumed that the phrase "existing law" as used in S. Rep. 1137, which was issued in January, 1952, "at that date included the Administrative Procedure Act as it had been interpreted in 1948, 1949, and 1950 by the *Trinler, Kristensen and Prince*[2] decisions" (R. 22, fn. 16). S. Rep. 1137 itself indicates no such adoption of the views of the Courts of Appeals which were overruled by this Court in *Heikkila* v. *Barber, supra.* More important, conjecture is precluded by the fact, noted above, that the significant and comprehensive S. Rep. 1515 was issued in April 1950, *after* the *Trinler* and *Kristensen* decisions by the Courts of Appeals, and embodies the express

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[2] *Prince* v. *Commissioner*, 185 F. 2d 578 (C.A. 6).

understanding of the Senate Judiciary Committee that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service" (*supra*, pp. 19-20). This statement reflects either ignorance or rejection of the view expressed in the *Trinler* and *Kristensen* cases. In either event, it completely refutes the speculation of the court below that by referring to "existing law" in S. Rep. 1137, which accompanied S. 2550, the Senate Committee was referring to the holding in those cases.

Thus, as S. 2550 and H.R. 5678 came to the floors of the Senate and the House, both provided in Section 242(b) that in deportation cases the Attorney General's decision should be final (and, in Section 236(c), that in exclusion cases "the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General").

The House Debate. The first debate took place in the House on H.R. 5678. There, Representative Meader introduced an amendment which would have deleted the provision of Section 242(b) of the bill that the Attorney General's decision in deportation cases shall be "final", and provided instead that "the order of deportation shall be subject to review by any court of competent jurisdiction." (98 Cong. Rec. 4415.) Representative Meader stated that "the most serious part, it seems to me, is the provision that the Attorney General's decision shall be final. I think it is about time we restored the right of individuals to have their cases

heard in a court. * * * If that language does not deny access to the courts, then it seems to me it does not belong in this act" (*Ibid.* 4415). However, Representative Walter, in charge of the bill, opposed the amendment and flatly contradicted Representative Meader's relation of the "final" clause to judicial review, stating (*ibid.* 4416):

> Now, we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedures Act is applicable. From that decision an appeal lies in the courts. If there is not a final administrative decision, then these aliens will go from one administrative body to another, seeking relief, because they do not want a final adjudication.
>
> * * * In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.
>
> I would like to remind the gentleman of one thing, that Senator McCarran, who sat in these hearings, and in the preparation of this bill, and I, were both commended by the American Bar Association because of the work we did in providing for judicial review from a decision of an administrative agency. We

> have been very zealous to see that the philosophy underlying that act is embodied in this measure. I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted.

The Meader amendment was defeated (98 Cong. Rec. 4416).

Representative Walter's statement in opposition to the Meader amendment is the only precise statement in the Congressional debates that Section 10 of the Administrative Procedure Act is made applicable to deportation cases—so as to subject deportation orders to review in proceedings other than habeas corpus. His statement was relied upon heavily by the court below (R. 22). However, the significance of Representative Walter's statement is lessened by the fact that it was based upon a serious misunderstanding as to the operation of the bill. His initial statement that the provision that in deportation cases the Attorney General's decision shall be "final" refers only to finality of administrative action, flies in the face of "a quarter of a century of consistent judicial interpretation" to which this Court gave decisive weight in *Heikkila* v. *Barber, supra.*

More important, Representative Walter based his conclusion upon page 163, paragraph 46 of H. R. 5678 (Section 403(a)(47) of the Act) which

repealed the paragraph of the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) which, to undo the result of this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, provided that "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act." In other words, Representative Walter was arguing that what is now Section 403(*a*)(47) of the Act, by repealing the quoted provision of the Supplemental Appropriation Act, 1951, made Section 10 of the Administrative Procedure Act applicable to deportation orders. However Sections 5, 7 and 8 of the Administrative Procedure Act, which were enumerated in the Supplemental Appropriation Act, deal only with the conduct of administrative hearings and have nothing to do with judicial review of deportation orders, and the repeal of that provision could have no effect upon the reviewability of deportation orders.

Since Representative Walter's position that the Meader amendment was surplusage appears from his own statement to be based upon a serious misunderstanding [3] of the operation of the bill, we sub-

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[3] This misunderstanding was repeated on the same day in the House when Representative Meader offered an unsuccessful amendment to subject to judicial review the Attorney General's exercise of the detention powers conferred by Section 242(a). In opposing this amendment, Representative Walter again stated (98 Cong. Rec. 4414) that:

> I would like to call the attention of the gentleman to the fact that on page 163 of the bill, paragraph 46, you will find that what the gentleman seeks to accomplish has been written into the law and the decision of the Supreme Court

mit that his statements are entitled to little weight in determining whether under the 1952 Act deportation orders may be reviewed by the courts otherwise than in habeas corpus proceedings.

The Senate debates. In the Senate, as in the House, discussion of the judicial review of deportation orders centered around proposed amendments which would have accomplished the result of the decision below. The Senate rejected three amendments which were probably intended to make forms of action in addition to habeas corpus available for the review of exclusion and deportation orders. The first amendment, which was in the nature of a substitute offered by Senator Lehman for himself and others, provided, *inter alia,* for the establishment of the Board of Immigration Appeals as an independent agency within the Department of Justice. Section 8 of the substitute provided that, "The provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens" (98 Cong. Rec. 5427-5428).

Senator Moody proposed a new Section 105(a), under which the Board of Immigration Appeals would have been vested with authority to review "any decision of the Attorney General * * * in proceedings relating to exclusion [or] deportation

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of the United States in the case of United States versus Sung has been reinstated. The rider that was attached to the deficiency appropriation bill has been set aside through the repeal of that particular section. So the judicial review is provided in all of these cases, and the gentleman's amendment is surplusage.

* * *." The Moody amendment concluded with the sentence "Except in the case of proceedings under section 235(c) [relating to security cases], the provisions of the Administrative Procedure Act shall apply to all proceedings of the Board" (98 Cong. Rec. 5778).

Senator Morse offered an amendment to Section 242(b) designed (1) to make the hearing provisions of the Administrative Procedure Act applicable to deportation and exclusion proceedings, and (2) to provide specifically that "Notwithstanding any provisions to the contrary, * * * every person aggrieved by an adverse order in exclusion or deportation proceedings may obtain court review in an action for declaratory judgment pursuant to title 28, United States Code, section 2201, or upon a writ of habeas corpus." (98 Cong. Rec. 5781.)

Senator McCarran opposed the Morse amendment, particularly on the ground that it would grant a right of judicial review with respect to *exclusion* orders, a right which, he asserted, had never previously been recognized under international law (98 Cong. Rec. 5789). He opposed the Moody amendment on the grounds (1), that it would create an administrative body, within the Justice Department, which could set aside decisions of the Attorney General, the highest officer of the Department, and (2) that it would be unwise to establish the Board of Immigration Appeals as a statutory body, in view of the provisions of S. 14, previously introduced by the Senator, to create an

administrative court to review all administrative determinations (98 Cong. Rec. 5778). Incident to the Moody amendment, Senator McCarran stated (98 Cong. Rec. 5778): "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now. The Senator need not worry about its not being in the law, because the Administrative Procedure Act covers the very point which the Senator is attempting to reach." Senator McCarran's statement, read in context, probably related to the *administrative* review provisions of the Moody amendment (see *supra*, pp. 27-28). Senator McCarran similarly objected to the "sweeping provision [in the Lehman substitute] that the provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens." Among other reasons, he opposed the Lehman substitute because of the pendency of S. 14, stating in this connection that "the question of the review of decisions of the Immigration and Naturalization Service had better not be the subject of impulsive tampering at this time" (98 Cong. Rec. 5625). The Lehman, Moody and Morse amendments were defeated (98 Cong. Rec. 5630).

It is clear that Senator McCarran was unwilling to permit non-habeas corpus review with respect to exclusion orders, and he and Senator Ferguson, another member of the committee from which the bill was reported, otherwise indicated that habeas corpus was the proper remedy for the review of

both exclusion *and deportation* orders, in the following colloquy (98 Cong. Rec. 5779):

> Mr. FERGUSON: I wish to inquire whether it would be possible to obtain an appeal through a writ of habeas corpus, in connection with which the application of the rule of substantial evidence would be determined.
>
> Mr. MCCARRAN: That is correct, and it is done right along.

The net result of the Congressional debates on the 1952 legislation was that both House and Senate rejected amendments which would have accomplished the result for which respondent now contends. While one may conjecture as to the action the House might have taken on the Meader amendment absent Representative Walter's statements, such speculation does not begin to constitute the clear evidence of Congressional purpose which should be required to subject deportation orders to direct judicial review—in the face of Congress' reiterated command that in such cases the Attorney General's decision shall be "final". The Senate's rejection of the Lehman, Moody and Morse amendments reflects, at the minimum, unwillingness to make deportation orders reviewable otherwise than in habeas corpus without detailed study of the review problem and, in particular, without distinguishing the review of deportation orders from the review of exclusion orders. The controlling significance of what Congress *did*, in contrast to general observations, is underlined in *United States* v.

South Buffalo R. Co., 333 U. S. 771, in which this Court stated that

> The considerations which led to the suggestion that the problem presented by the Government's position would require separate legislation and particular consideration seems to us to require that the problem be left to legislation rather than to the judicial process. And the pertinent portions of the legislative history which are set out at length in the margin indicate clearly, we think, that this Senate Committee responsible for S. 2009, which became the Transportation Act of 1940, deliberately refused to recommend and the Congress refused to legislate into the law the change we are now asked to make by judicial decision [pp. 778-780].

Here, too, the respondent should address his argument to Congress.

The House and Conference Reports. Against this background, we believe that the decision below finds no support in the general terms of the Conference Report, H. Rep. 2096, 82d Cong., 2d Sess., which states briefly that (p. 127):

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework of the pattern of the Administrative Procedure Act. The safeguard of judicial

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procedure is afforded the alien in both exclusion and deportation proceedings.

The first sentence recites only that consideration has been given to problems of judicial review under the bill—problems of whether and what review should be provided for consular decisions on visa applications and for claims of citizenship—as well as for exclusion and deportation decisions. The second sentence can mean no more than that the special administrative procedures provided in Sections 236 and 242 for exclusion and deportation cases were designed to afford aliens the protection of precisely defined procedures and procedural rights. That such general terms throw no light on specific problems of judicial review is demonstrated in the report of the House Committee on the Judiciary (H. Rep. 1365, 82d Cong., 2d Sess., p. 28), which simply states that the bill "Safeguards judicial review and provides for fair administrative practice and procedure (secs. 235, 242, and 360)." The provisions in the enumerated sections for judicial action relate to judicial enforcement of administrative subpenas (Section 235), a limited review of detention decisions in habeas corpus proceedings (Section 242), and judicial determination of certain claims of American citizenship (Section 360). Thus, it is clear that general references to judicial review under the Act may relate to any one of several different matters, and, absent a specific context, are of no assistance in the interpretation of a particular provision of the Act.

As noted above, the fact that in Section 242(b)

of the 1952 Act Congress again provided that the Attorney General's decision in deportation cases should be "final", is alone enough, in view of the history of such finality provisions, to preclude judicial examination of deportation orders except in habeas corpus proceedings. This conclusion finds authoritative support in S. Rep. 1137 which left the review of deportation orders to "existing law," which was carefully defined in the foundation S. Rep. 1515 as precluding judicial review except in habeas corpus proceedings. Thereafter, the problem was specifically discussed only in the course of rejecting repeated amendments which would have changed this established rule. Nothing else which was said in committee reports or debate was specific enough to justify ignoring the specific language of the Act itself and what Congress *did* in rejecting amendments which would have achieved the result which respondent urges. Accordingly, we submit that the rationale of *Heikkila* v. *Barber, supra,* controls, and that, therefore, deportation orders issued under the 1952 Act may be challenged in the courts only in habeas corpus proceedings.

Other provisions of the 1952 Act. While it was entirely proper for the court below to look to other provisions of the 1952 Act in determining what consequences attach to the provision of Section 242(b) that in deportation cases the Attorney General's decision shall be "final" we contend that it drew erroneous conclusions from Sections 242 and 360.

Thus, the court below placed great reliance (R. 19-21) upon the provision of Section 242(c) that

"the Attorney General shall have a period of six months from the date of such [deportation] order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States * * *."[4] Referring to this Court's distinction in *Heikkila* v. *Barber, supra,* between habeas corpus and "judicial review as that term is used in the Administrative Procedure Act" (345 U. S. at 236), the court below stated that " 'Judicial review' is not synonomous with habeas corpus," and concluded that by this oblique reference to "judicial review" in Section 242(c) Congress intended to make deportation orders reviewable otherwise than in habeas corpus (R. 19). To the contrary, we believe that it is clear on the face of Section 242(c) and (e) that these incidental references to "judicial review" merely reflect the understanding of Congress that the actual deportation of an alien is sometimes deferred while federal courts examine deportation orders *in habeas corpus proceedings,* and were made solely for the purpose of insuring that the authorized detention period shall not end until six months after the Attorney General becomes free to effect the alien's removal.

Moreover, there is no basis for the lower court's assumption that in thus alluding to "judicial review" Congress was drawing a precise technical distinction between habeas corpus and "judicial review," or for the repeated supporting assump-

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[4] A similar reference to "judicial review" appears in Section 242(e).

tion that Congress was aware of, accepted, and wrote into the Act the result of the *Trinler, Prince* and *Kristensen* decisions of the Third and Sixth Circuits and of the court below (R. 20). Both assumptions are completely contrary to the expressed views of the Senate Judiciary Committee (*supra*, pp. 19-20), in S. Rep. 1515, *The Immigration and Naturalization Systems of the United States* (p. 629) that:

> * * * In a habeas corpus proceeding, based on a deportation case, the court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. *Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.* * * * [Emphasis supplied.]

In view of this precise understanding of the Senate Committee that habeas corpus was the sole method by which deportation orders can be challenged in the courts, plus the express refusal of Congress to provide additional methods of review, it cannot be contended that the incidental allusions to "judicial review" in Section 242(c) and (e) refer to anything other than review in habeas corpus proceedings.

The quoted language of the definitive S. Rep. 1515 likewise reveals, contrary to the assumption of the court below (R. 19), that the Senate Judiciary

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Committee understood that the Attorney General's findings must be supported by substantial evidence even in habeas corpus proceedings, thus indicating that by providing in Section 242(b)(4) that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence" the Committee did not anticipate or intend that this language would make any changes in the manner or in the timing of review of deportation orders.

As a matter of fact, the only fair conclusion that can be drawn from Section 242 as a whole is that the sole method of review contemplated by that section is in habeas corpus proceedings. In subdivision (a) provision is made for detention or release of the alien "pending a determination of deportability." Subdivision (b) provides for the administrative procedure to be followed in determining deportability. And then subdivision (c) provides that

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond [etc.].

The court below, while recognizing that in Section 242(a) and (c) Congress intended to provide au-

thority for the continuous detention of an alien from the commencement of deportation proceedings and until the Attorney General has six months in which to effect his deportation, saw a possible gap in this authority. It found this gap in the period in which an alien is challenging the order for his deportation in the courts, on the theory that "if judicial review is had" paragraph (c) authorizes detention of the alien only during the period of six months following the completion of the judicial proceedings. The court below closed this asserted gap by reading the detention provision of paragraph (a), notwithstanding its express limitation to "pending a determination of deportability" as applying during the period of "judicial review" (R. 23). However, it should be noted that there is no "gap" if the reference to "judicial review" in paragraph (c) is read to mean review in habeas corpus. Since the alien may commence habeas corpus proceedings only after he has been taken into custody under a final order of deportation, there was no need to provide in Section 242(c) an express grant of authority to take the alien into custody during the pendency of the judicial proceedings. The mere fact that such an apparent break in the authority to detain is created by the decision below, strongly suggests that the Act contemplates that deportation orders will be challenged only in habeas corpus proceedings, in which event no such gap exists.

Finally, the court below sought textual support for its conclusions in the provision of Section 360

(c) of the 1952 Act that "A final determination by the Attorney General that any *such* person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise" (emphasis added). The court below concluded from this language that Congress had expressly limited persons seeking admission to the United States to review in habeas corpus, and that its failure to impose such a restriction in deportation cases reflected a purpose to make deportation orders reviewable in proceedings other than habeas corpus (R. 20-21). In fact, this provision had an entirely different purpose and history. Under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, persons claiming to be citizens or nationals of the United States, regardless of whether such persons were within or outside the United States, were given a special declaratory judgment procedure to obtain a judicial determination of their claims. The purpose of Section 360 of the 1952 Act is to make that judicial procedure unavailable to persons outside the United States and to provide for the determination of the claims of limited groups of such persons by the Attorney General in administrative exclusion proceedings. In providing that such determinations of the Attorney General "shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise", Section 360(c) is obviously intended to emphasize and make clear the withdrawal of the right to an independent judicial de-

termination. It has nothing to do with ordinary exclusion cases as to which Section 236(c) provides, like the former exclusion statute which was before this Court in *Tom We Shung* v. *Brownell,* decided per curiam December 7, 1953, that the administrative decision shall be final. In brief, the court below drew an entirely erroneous conclusion from Section 360(c).

Practical considerations.

In the Government's brief in *Martinez* v. *Neely,* affirmed by an evenly divided Court, 344 U. S. 916, we pointed out that only legislation could provide for judicial review of deportation orders as soon as they are administratively final, and at the same time prescribe orderly venue arrangements and minimize the possibilities for repetitious review. The Department of Justice has prepared a proposed bill to accomplish these objectives and is seeking the suggestions of appropriate bar groups.

The decision below raises a particularly serious problem in that it suggests, what we do not concede, that orders of the Attorney General excluding aliens from the United States, as well as deportation orders, could be challenged in the courts in proceedings other than habeas corpus. As this Court apparently held in *Tom We Shung* v. *Brownell, supra,* the rationale of *Heikkila* v. *Barber, supra,* compelled the conclusion that under the provision for finality in exclusion cases in Section 17 of the Immigration Act of 1917 (8 U. S. C. 153), Federal courts lacked jurisdiction to examine ex-

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clusion orders except in habeas corpus proceedings. Section 236(c) of the 1952 Act provides, in language taken substantially verbatim from the 1917 Act, that "where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General." In *Tom We Shung,* this Court apparently found no distinction between the provisions for finality in the deportation and exclusion provisions of the 1917 Act. The same finality provisions were reenacted practically verbatim in Sections 236(c) and 242(b) of the 1952 Act. Obviously, it could be argued that they have and were intended to have the same consequences as to the availability of judicial review.

As we have pointed out above (*supra,* pp. 28-30), It was made clear in the 1952 debates that Congress, particularly the Senate, was unwilling to subject exclusion orders to challenge in the courts except in habeas corpus proceedings. Thus, unless the decision below is reversed, it might accomplish with respect to exclusion orders what Congress specifically was unwilling to do. Only Congress, by legislation, can provide for the review of deportation orders in declaratory judgment actions, for example, while leaving exclusion orders reviewable only in habeas corpus as it apparently desires to do.

We submit, therefore, that the court below erred in the holding that the district court had jurisdic-

tion to review the order for respondent's deportation in an action under the Declaratory Judgment and Administrative Procedure Acts and in directing, upon the basis of that holding, that the Attorney General be restrained from taking respondent into custody.

II

The Attorney General's Exercise of the Discretionary Authority Vested in Him by Section 242 to Detain an Alien Who Has Been Ordered Deported May Not Be Controlled by Enjoining Him from Taking the Alien into Custody at All.

Even if it is held, contrary to our argument under Part I, that under the 1952 Act the order for respondent's deportation can be challenged in an action under the Declaratory Judgment and Administrative Procedure Acts, we submit that under Section 242 the court below was without power to direct the issuance of a preliminary injunction restraining the Attorney General from "revoking [respondent's] bail and from taking him into custody on a warrant of arrest for deportation, pending final determination of this suit, unless the [Attorney General] shows to the court that there are adequate reasons for making the arrest" (R. 28).

In 1949, at the beginning of the administrative deportation proceedings, the Immigration and Naturalization Service released respondent under a bond for $1,000. On December 29, 1952, the date of the Attorney General's final decision that respondent should be deported, the Commissioner of Immigration signed a warrant of deportation which

directed that respondent be taken into custody and deported, and on December 30, Maryland Casualty Company, the surety on the bond, was directed to surrender respondent for deportation.

Section 242(a) provides in pertinent part:

> * * * Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. *Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.* [Emphasis supplied.]

Section 242(c) provides:

> When a final order of deportation under administrative processes is made against any

> alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, *at the Attorney General's discretion, the alien may be detained,* released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. *Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances* in the case of any alien *to effect such alien's departure from the United States within such six-month period.* * * * [Emphasis supplied.]

We submit that the quoted language, read in the setting of immigration law and practice in which it was enacted, precluded the courts below from restraining the Attorney General in advance from revoking the respondent's bail and taking him into custody, and means that if the Attorney General decides to detain an alien who has been ordered deported such action can be reviewed only after he has acted and then only in habeas corpus proceedings.

At the outset, we call attention to the view of the

court below that the detention of an alien who has been ordered deported after administrative proceedings is governed by paragraph (a) of Section 242, and not by paragraph (c). The court below, looking to the reference in Section 242(c) to a period of six months "from the date of the final order of the court" "if judicial review is had," concluded that that subsection provides no authority for the detention of an alien during the period in which he is challenging the order for his deportation in the courts. However, the court below further decided that detention of the alien during such period was authorized by Section 242(a) because "Congress can hardly have meant to give the Attorney General no authority to arrest the alien, in any circumstances, during the present interval between the final administrative deportation order and the final order of the court" (R. 23). We agree with the reasoning of the court below that Congress, which, in Section 242(a), gave discretionary power to the Attorney General to detain aliens during administrative proceedings to determine whether they should be deported, could not have intended to deny him such power with respect to aliens who had been ordered deported, even during judicial review. Regardless of whether paragraph (a) or paragraph (c) of Section 242 controls here, the result should be the same because both paragraphs contain substantially identical detention provisions. While the following argument is couched in terms of the applicability of paragraph (c), it could be based as well upon paragraph (a).

The provision of Section 242(c) that the Attorney General may "detain" or release on bond or other condition indicates on its face that Congress assumed that the alien would be in custody pursuant to the Attorney General's determination before that determination could be revised by the courts.

If the respondent had been already in custody at the time when he commenced this action, it would be clear that he could challenge a determination of the Attorney General to continue him in custody only in habeas corpus proceedings. This follows from the second sentence of Section 242(c) which provides that "Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period *upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and* circumstances in the case of any alien *to effect such alien's departure from the United States within such six-month period.* * * *" We set forth later in this brief our view that under this provision the Attorney General's determinations with respect to detention or release, during the period of judicial proceedings or during the following six months period, may be challenged only for a lack of reasonable dispatch on his part. But regardless of the scope of the judicial power to revise his determinations, it is clear from this portion of

Section 242(c) that Congress intended them to be reviewed only in habeas corpus proceedings.[5] This reading is confirmed by the reports of the Senate and House Committees on the Judiciary which in describing the detention provisions of Section 242(a) and (c) state that such determinations by the Attorney General "shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch * * *" (emphasis supplied). S. Rep. 1137, pp. 29, 31, H. Rep. 1365, pp. 57-58, both 82nd Cong., 2d Sess. The express statements in the Committee reports that the Attorney General's determinations with respect to detention or release may be reviewed "only" or exclusively in habeas corpus proceedings merely confirm the obvious meaning to be drawn from the language of the Act.[6] Since Congress intended such detention determinations to be reviewed only in habeas corpus, it follows that it intended that such determinations should be reviewed only after the alien was actually in custody and not before.

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[5] Since a practically identical provision appears in Section 242(a), the same result would follow if, as the court below thought, that subsection controlled this case.

[6] As S. 2550, 82d Cong., 2d Sess, was reported to the Senate, there was added to the above-quoted portion of Section 242(c) (and to the corresponding provision of Section 242(a)) the phrase ", but not otherwise." No such provision was contained in the House bill, H. R. 5678, 82d Cong., 2d Sess., and in Conference the phrase was deleted from the Senate bill without explanation. Significantly, the House Report used the word "only" with reference to the House bill which did not contain the words "but not otherwise."

The circumstance that the Attorney General had released the respondent on bond prior to ordering him deported affords no basis for ignoring the command of Congress that the Attorney General's determinations with respect to detention or release shall be reviewed only in habeas corpus proceedings. If the respondent can obtain a preliminary injunction restraining the Attorney General from returning him to custody after he has been ordered deported, other aliens who are released on bond and later ordered deported can do likewise, and in fact, a number of aliens have done so in the District Court for the District of Columbia following the decision below. We submit that it is utterly inconsistent with the whole pattern of past and present immigration statutes to hold that the Attorney General must justify in advance, in the argument and affidavits incident to an application for a preliminary injunction, his prospective exercise of the broad discretionary powers with respect to detention and release vested in him by Section 242(c). Certainly, this result cannot be predicated upon the action of Congress in inserting in detention powers carried forward from Section 23 of the Internal Security Act provisions for judicial review of detention actions which were clearly intended to narrow the holding of *Carlson* v. *Landon*, 342 U. S. 524, 540, as to the scope of such review (see *infra*, pp. 49-51).

The inconsistency of the decision below with the statutory pattern is well stated in the dissent of Judge Fahy to the per curiam order of the court

below granting an earlier motion for a restraining order (R. 14):

> As I read the statute, * * *, particularly § 242(c), the Attorney General is authorized at this point in the deportation proceedings, which have progressed to a final administrative order of deportation, to detain appellant, release him on bond in an amount and containing such conditions as the Attorney General may prescribe, or release him on such other conditions as the Attorney General may prescribe. The warrant of deportation under which appellee now seeks to apprehend and detain appellant does not exhaust the discretion reposed by these provisions in the appellee; and if after apprehension that discretion should be illegally exercised, or if appellant should otherwise be illegally detained, relief by writ of habeas corpus would be available to appellant. In these circumstances I would not now intervene by our injunctive process to restrain the Attorney General. Although McGrath v. Kristensen, 340 U. S. 162 (1950), holds that the declaratory judgment procedure, which appellant is pursuing, is available to test the legality of a deportation order, it does not follow that the equitable powers of this court need be exercised to restrain steps which at present, as they seem to me, accord with the statutory plan in deportation cases.

We submit, therefore, that even if the order for petitioner's deportation may be reviewed in this action, Section 242(c) precludes the courts below

from issuing a preliminary injunction restraining the Attorney General from taking respondent into custody.

The error of the court below in ordering that the Attorney General be restrained from taking respondent into custody is emphasized by its stated reason for doing so—that respondents' detention "would be a clear abuse of discretion". We submit that in Section 242(c) Congress clearly intended that the Attorney General's determinations with respect to detention or release should be unreviewable by the courts even in habeas corpus proceedings, except that his determinations may be revised upon a conclusive showing that he is not proceeding with reasonable dispatch to effect the alien's deportation. *A fortiori,* the Attorney General cannot be enjoined from taking an alien into custody without even an allegation that he is not proceeding with reasonable dispatch.

The detention provision of Section 242(c) was derived from Section 23(a) of the Internal Security Act of 1950 (64 Stat. 987, 1010, 8 U. S. C. (Supp. V) 156(a)), which provided that:

> * * * When such an order of deportation has been made against any alien, the Attorney General shall have a period of six months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for sur-

> render of the alien to the Immigration and Naturalization Service as may be determined by the Attorney General.

In *Carlson* v. *Landon*, 342 U. S. 524, this Court concluded that the words "at the Attorney General's discretion" were used to resolve dispute as to whether release on bond was a right of the alien or a matter of discretion with the Attorney General. The Court also stated (at p. 540) that:

> The Government does not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse. We proceed on the basis suggested by the Government.

In holding that the Attorney General's determinations as to detention or release of aliens under the 1950 Act were reviewable for "clear abuse," this Court in substance affirmed the view of the Court of Appeals for the Ninth Circuit in the same case, *Carlson* v. *Landon*, 186 F. 2d 183, decided in December 1950.

Significantly, when S. 3455, 81st Cong., 2d Sess., the bill which evolved into the 1952 Act, was introduced in April 1950, Section 242(c) then contained a detention provision substantially identical with that in Section 23(a) of the 1950 Act. The present detention provisions of Section 242(c) first appear in the successor S. 2055, 82d Cong., 1st Sess., introduced in August 1951, following the decision of the Ninth Circuit in *Carlson* v. *Landon*, *supra*, in December 1950.

The detention provisions of Section 242(c) of the 1952 Act differ from the detention provisions of the 1950 Act in the addition of the second sentence of that section which reads as follows:

> * * * Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period.

We have already pointed out, (*supra*, at pp. 45-46) that the quoted sentence has the intended effect of making the Attorney General's decisions with respect to detention or release reviewable only in habeas corpus proceedings. In addition, the quoted language can only mean that such determinations can be revised, even in habeas corpus, only upon "a conclusive showing" that the Attorney General is not proceeding with reasonable dispatch to effect the alien's deportation. The clear and only possible meaning of these words is that Congress desired to make such determinations of the Attorney General otherwise unreviewable by the courts during the stated period.[7]

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[7] The sole exception, where there is delay in effecting the alien's deportation, is an apparent recognition of the possi-

We submit that these express limitations which Congress has placed upon review of the Attorney General's detention determinations cannot be evaded by enjoining him from taking an alien into custody at all. At a minimum, any doubts as to the scope of review which Congress has provided for such determinations should be resolved in habeas corpus proceedings, which Congress has directed, as it undoubtedly may do, shall be the exclusive channel for challenging them.

During the judicial examination of the validity of a deportation order, it may be said that no alien could ever show that the Attorney General was not proceeding with reasonable dispatch to effect his deportation. If it is felt that during such judicial proceedings Congress intended some other test to be applied by the courts in reviewing the propriety of the alien's detention, we think the test should be that applied by Judge Proctor dissenting in the court below (R. 26-27) and by Judge Letts in the District Court (R. 7-10), i.e., whether the underlying action challenging the deportation order presents a "substantial question" creating "a reasonable belief that the plaintiff will prevail upon a final hearing" (R. 27). As stated above, Congress has made clear its purpose that the Attorney General's determination that the detention of an alien is in the public interest shall be unreviewable. We may assume, *arguendo*, that it would not be incon-

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bilities of delay referred to in *United States ex rel. Potash* v. *District Director*, 169 F. 2d 747, 751 (C.A. 2); and see *Carlson* v. *Landon*, 342 U.S. at 546.

sistent with this legislative purpose for a court to review such a determination upon a showing that the deportation order is based upon such shaky grounds that the alien will probably succeed in his challenge.

But the latter situation is not present here. The only substantial attack which respondent has made upon the order for his deportation is that his conviction in 1947 on 4 counts of an indictment for knowingly making false statements, and conspiring to do so, to avoid military service in violation of the Selective Training and Service Act of 1940, did not constitute a conviction of a crime involving moral turpitude within the meaning of the immigration laws. See *United States* v. *Rubinstein*, 166 F. 2d 249 (C. A. 2), certiorari denied, 333 U. S. 868. We submit that this contention, involving only a question of law, is frivolous for the reasons stated by Judge Letts in the District Court (R. 9-10) and by Judge Proctor dissenting in the court below (R. 26-27). Accordingly, there was no basis for restraining the Attorney General from taking respondent into custody pursuant to Section 242(c) of the Act.

CONCLUSION

Regardless of whether the order for respondent's deportation may be reviewed only in habeas corpus proceedings, as we contend, or also in an action under the Declaratory Judgment and Administrative Procedure Acts, as the court below held, the court below erred in directing the District Court

to issue a preliminary injunction restraining the Attorney General from taking respondent into custody. The judgment should be reversed.

Respectfully submitted.

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DECEMBER 1953.

APPENDIX

The Immigration and Nationality Act (Pub. Law 414, 82d Cong. 2d sess.) provides in pertinent part:

> Sec. 242. (a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding

sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the

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deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney

General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), or section 322 of the Act of June 30, 1932, as amended (40 U.S.C. 278a), to expend,

from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

Sec. 360. * * *

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State,

who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U.S.C. 1009, provides in part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applica-

bility of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 19(a) of the Immigration Act of 1917, 39 Stat. 874, 889, as amended, 8 U. S. C. 155(a), provided that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

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